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# Some Ethical Considerations for Judicial Clerks

JOHN PAUL JONES\*

## INTRODUCTION

Since 1875, new law graduates have served judges of federal and state courts as legal researchers, executive assistants, and professional confidants.<sup>1</sup> In return, the best of the newest lawyers have gotten a chance to complement their classroom education with field study of bench and bar—from behind the bench. The ideal relationship which should develop between law clerks<sup>2</sup> and their judges is symbiotic: the judges enjoying the energies and fresh per-

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\* Professor of Law, University of Richmond School of Law. The author wishes to thank William O. Quirey, Jr., University of Richmond School of Law Class of 1992 for diligence and acuity as a research assistant. This article grew out of a chapter in *A Guide for Judicial Clerks in State Courts*, produced by the author as part of a judicial clerkship education project supported by a grant from the State Justice Institute, a private, non-profit corporation created by Congress in 1984 to further the development and adoption of improved judicial administration in state courts. See 42 U.S.C. § 10701 (1988).

1. Horace Gray first employed a recent law graduate as a personal assistant when he was Chief Justice of the Massachusetts Supreme Court and his half brother, John Chipman Gray, was a professor at Harvard Law School. Justice Gray took the practice with him to the United States Supreme Court in 1882. J. OAKLEY & R. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS* 11 (1980). The first official mention of clerical assistance for Supreme Court Justices was made in the 1885 Annual Report of the Attorney General of the United States which recommended statutory provision of stenographic assistance, a recommendation which was acted on in the Sundry Civil Act of August 4, 1886 (24 Stat. 254 (1886)). Within two years each of the nine Justices employed an assistant. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299, 301 (1961). Law clerks appeared in the chambers of the Supreme Court of California in 1930, J. OAKLEY & R. THOMPSON, *supra*, at 32 n.2.86), and within the next several years began serving jurists of the highest courts of Illinois, New Jersey, New York, Oklahoma, and Pennsylvania as well. *Id.* at 18. See also Dorsen, *Law Clerks in Appellate Courts in the United States*, 26 MOD. L. REV. 265 (1963). An abridged version of the Oakley and Thompson book appears as *Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges*, 67 CALIF. L. REV. 1286 (1979).

2. In this article, the term "law clerk" is treated as synonymous with the term "judicial clerk." They both denote recent law school graduates who spend a year or two as paid members of the personal staff of a judge, performing legal research, drafting and editing court documents, and otherwise assisting the judge. Some judges (e.g., those of the California Supreme Court) prefer to engage lawyers as a career, rather than employ lawyers for only one or two years. J. OAKLEY & R. THOMPSON, *supra* note 2, at 31. Many courts also employ staff attorneys. Staff attorneys too can be either recent law graduates or career professionals who assist one or more judges in the court's work. Judicial clerks and staff attorneys are as easily distinguished by their situations as by their functions: judicial clerks are selected by judges, work directly for judges, and share their chambers; staff attorneys are selected by a senior lawyer employed by the court, operate under that lawyer's direction, and share a central office in the courthouse. A law clerk who works for more than one judge can look a lot like a staff attorney, just as a staff attorney continuously assisting a particular judge with a complex case can, after a while, look a lot like that judge's personal clerk. In terms of what they do and learn, distinctions between judicial clerks and staff attorneys are insignificant. *But cf.* 15 Comp. Gen. 765 (1936) (a judge's clerk works for the judge not the court, so that the Federal

spectives of brand new professionals rated top among their contemporaries by law professors, and the law clerks obtaining tutorials by senior jurists regarded as among the best by their former peers at the bar.

The special relationship between judge and clerk raises special questions of professional conduct for both. Various published standards supply at least some of the answers. Once a law clerk has been admitted to the bar, he will be bound by the standards expressed in his bar's code of professional responsibility.<sup>3</sup> As the trusted agent of a judge, a clerk is regarded by some courts as bound by the judicial standards binding his principal.<sup>4</sup> Law clerks in federal courts are bound by a code designed particularly for them.<sup>5</sup> Law clerks in some state courts are expressly charged with adherence to particular local standards,<sup>6</sup> although no code has yet been developed for general application to the conduct of law clerks in state courts.<sup>7</sup> These clerks are therefore bound, if at all, only by the patchwork quilt consisting of bar standards applicable after admission and bench standards applicable by derivation.

#### CODIFIED STANDARDS APPLICABLE TO LAW CLERKS

All attorneys, including law clerks, are bound as soon as they acquire membership in their local bar by standards of professional conduct adopted by their bar. These are generally based in whole or in part on the American Bar Association's *Model Code of Professional Responsibility* or *Model Rules of Professional Conduct*.<sup>8</sup> Sections of these codes that are of particular relevance to a law clerk are:

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prohibition on appointment of family members may not apply.) See *infra* notes 44-45 and accompanying text.

While still in school, law students sometimes perform on a part-time basis some or all of the duties assigned a law clerk or staff attorney. These typically unpaid assistants are called "interns" or "externs," sometimes depending on whether their work at the court earns them law school credits for clinical education. This article is intended as much for their edification as for that of their seniors in post-graduate assignments.

3. See *infra* note 8.

4. See *infra* note 14 and accompanying text.

5. See *infra* note 15 and accompanying text.

6. See *infra* note 16 and accompanying text.

7. A Model Code of Conduct for Nonjudicial Court Employees has been offered by the American Judicature Society. See Ozar, Kelly & Begue, *Ethical Conduct of Nonjudicial Court Employees: A Proposed Model Code*, 73 JUDICATURE 126 (1989). It is intended for court clerks, docket clerks, data processing personnel, bailiffs and judicial secretaries. *AJS Model Code of Conduct for Nonjudicial Court Employees*, 73 JUDICATURE 138, 138 (1989) [hereinafter *AJS Model Code*]. Originally, its authors intended to include law clerks as well. Ozar, Kelly & Begue, *Ethical Conduct of State Court Employees and Administrators: The Search for Standards*, 71 JUDICATURE 262, 266 (1988). However, in the final version, its authors explicitly omit from coverage law clerks, "who should be held to a higher standard." *AJS Model Code*, *supra* at 138.

8. At one time, the standards of professional responsibility adopted by almost every state closely resembled those in the *Model Code of Professional Responsibility* promulgated by the American Bar Association in 1969. By the end of 1987, 25 states had modified their codes in response to the

DR 8-101. *Action as a Public Official.* (A) A lawyer who holds public office shall not:

\* \* \*

(3) Accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as public official.<sup>9</sup>

DR 9-101. *Avoiding Even the Appearance of Impropriety.*

\* \* \*

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.<sup>10</sup>

Model Rule 1.12(b) (in pertinent part):

A lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator.<sup>11</sup>

Judges are bound by the standards of professional conduct adopted for their court.<sup>12</sup> By their terms, such standards expressly bind only judges, not law clerks, but certain standards specifically address the judge's responsibility for the actions of his staff.

Two rules in the ABA *Code of Judicial Conduct* which refer to a judge's staff are:

Rule 3.A *Adjudicative Responsibilities*

\* \* \*

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

\* \* \*

(6) A judge should abstain from public comment about a pending or

*Model Rules of Professional Conduct* adopted by the ABA in 1983 as a replacement for the *Model Code*. M. SCHWARTZ & R. WYDICK, *PROBLEMS IN LEGAL ETHICS* 10 (2d ed. 1988).

9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-101 (1980) (hereinafter MODEL CODE); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(e) (1983) (hereinafter MODEL RULES).

10. MODEL CODE DR 9-101 (B)-(C); see also MODEL RULES Rules 1.11, 1.12(b), 7.1(b), 8.4(e).

11. MODEL RULES Rule 1.12.

12. Forty-seven states, the District of Columbia, and the Judicial Conference of the United States have adopted, in whole or in substantial measure, the *Model Code of Judicial Conduct* promulgated by the American Bar Association in 1972. For a current list of citations to the Code as adopted in each state, see J. SHAMAN, S. LUBET, & J. ALFINI, *JUDICIAL CONDUCT AND ETHICS* § 1.02 nn.18-19 (1990).

impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control.

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### Rule 3.B *Administrative Responsibilities*

\* \* \*

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.<sup>13</sup>

Even when they are not expressly held by judicial standards, law clerks can be otherwise held to those standards by the expectations of their judges. At least two federal courts of appeal have concluded that what binds the judge also binds the law clerk.<sup>14</sup> Additionally, law clerks in federal courts are bound by a *Code of Conduct for Law Clerks* adopted by the Judicial Conference of the United States in 1981,<sup>15</sup> and some judges bind their law clerks with oaths or written agreements.<sup>16</sup>

## ETHICALLY SENSITIVE AREAS FOR CLERK AND JUDGE

Three subjects are important enough to warrant particular discussion about a law clerk's duty: the confidentiality of chambers, the appearance of conflict of interest, and the limits imposed by decisionmaking on the record. How well a law clerk fulfills these duties is rarely if ever noticed by anyone, including her judge. What does attract (unwanted) attention is the occa-

13. CODE OF JUDICIAL CONDUCT Canon 3(A)(3),(A)(6), 3(B)(2) (1972). In Texas, the State Commission on Judicial Conduct publicly admonished Supreme Court Justice William W. Kilgarlin in 1987 after two law clerks from his staff accepted free weekend vacations in Las Vegas from a law firm with cases pending before his court. The Commission found that Justice Kilgarlin had failed to require his staff to observe ethical standards. Blodgett, *Texas Justices' Conduct Hit*, 73 A.B.A. J., Sept. 1, 1987, at 19; Taylor, *Defiant Justices Say They Won't Quit*, NAT'L L.J., Jun. 29, 1987, at 7, col. 1.

14. Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983) (see *infra* text accompanying note 29); Price Brothers Co. v. Philadelphia Gear Corp., 629 F.2d 444, 447 (6th Cir. 1980), cert. denied, 454 U.S. 1099 (1981) (see *infra* text accompanying note 48). Cf. *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, (5th Cir.), cert. denied, 449 U.S. 888 (1980) (see *infra* text accompanying note 21).

15. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 28 (1981). The Judicial Conference was established by Congress in 1922. Myers, *Origin of the Judicial Conference*, 57 A.B.A. J. 597, 597 (1971). Comprised of the Chief Justice, the chief judge of each judicial circuit, and a district court judge from each circuit, the Conference is charged with overseeing the conduct of business in the federal courts, and is empowered to make recommendations and adopt rules which enhance court efficiency, fairness, and cost effectiveness. See 28 U.S.C. § 331 (1988). Certainly this equality of honor which binds the judge and her clerk is reflected as well in the *Code of Conduct for Law Clerks*. The very language of the Canons of that Code closely parallels in many instances that of the *Code of Judicial Conduct*. The Code of Conduct for Law Clerks, as most recently amended in 1988, appears as an appendix at the end of this article.

16. Comment, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230, 1236 (1981) (hereinafter *Confidential Duty*).

sional breach of one of these duties. The consequences of even a careless slip can extend far beyond the remainder of the clerk's term with the court, affecting not only her own professional reputation and career, but also the trust her judge will extend to the clerks who follow in subsequent years.

#### WHAT GOES ON IN CHAMBERS STAYS IN CHAMBERS

A judge is bound by Canon 3 of the *Code of Judicial Conduct* to perform her duties impartially.<sup>17</sup> She must not only refrain from public comment about a pending or impending proceeding in any court, but must also require similar abstention by her clerks.<sup>18</sup> In 1919, a clerk for Justice McKenna of the United States Supreme Court used inside information about decisions not yet announced by the Court to speculate in the stock market. An investigation by the Attorney General resulted in both the law clerk's resignation and his criminal indictment.<sup>19</sup> In *In re Corrugated Container Antitrust Litigation*,<sup>20</sup> the court considered whether a trial judge should have been disqualified after his law clerk volunteered her own opinions about the case to the defendant's lawyer and commented to a reporter on a settlement proposal in a related civil suit. The court of appeals found that the law clerk's comments to counsel raised many questions of propriety and that her statement to the press "most likely breached duties imposed upon her by Canons 3 A(6), and 3 B(2), of the Code of Judicial Conduct for United States Judges."<sup>21</sup> As the cause of appellate review for her judge's abuse of discretion is not how a law clerk would wish to be remembered — by her judge, by the courts, or by the spectating bar.

#### WHAT GOES ON IN CHAMBERS STAYS IN CHAMBERS PART II

Aside from the law clerk's derivative duty to refrain from comments indicating pre-judgment or bias regarding pending cases, he has a duty to preserve the privacy of the court. Thus, long after the case has been completed, an obligation may still exist to keep confidential that information to which the clerk has been made privy only through the special access he acquired as a member of the chambers staff. The authors of *The Brethren: Inside the Supreme Court* bragged that more than 170 former law clerks had contributed inside information to their expose of the inner workings of the Supreme Court.<sup>22</sup> When law clerks or former law clerks tattle about the off-bench

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17. See CODE OF JUDICIAL CONDUCT Canon 3(A)(1) (1972).

18. See *id.* at Canon 3(A)(6); CODE OF CONDUCT FOR LAW CLERKS Canon 3(c).

19. Newland, *supra* note 1, at 310.

20. 614 F.2d 958, 963 (5th Cir. 1980).

21. *Id.* at 968 (citations omitted).

22. B. WOODWARD & S. ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 3-4 (1979). Writing with obvious journalistic pride, the authors noted:

remarks, behavior, or collegiality of their judges, they violate the trust placed in them when they are invited into the private world of the chambers.<sup>23</sup>

Just as the cloak of confidentiality enhances the effectiveness of the relationship between attorney and client, it also enhances the effectiveness of the relationship between law clerk and judge. One judge has written:

My relationship with my law clerks is a close and confidential one. If I cannot speak freely to them, they cannot do their job for me. And I could not speak freely to them if I thought that my questions, soul-searching, and opinions would be made matters of public record or private conversation. There is often a good deal of give and take and what finally emerges may not have been anyone's original thought. If my half-formed ideas or preliminary thoughts are not kept confidential by my law clerks—then I will have to keep them confidential myself and that will seriously impair the decision-making process.<sup>24</sup>

Telling tales out of court is incompatible with the clerk's role as confidant and sounding board. It also threatens a major benefit of the clerkship for future clerks, and it should raise questions among the clerk's observers about his capacity for protecting the secrets of his future law firm and its clients.

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Most of the information in this book is based on interviews with more than two hundred people, including several Justices, more than 170 former law clerks, and several dozen former employees of the Court. . . . Virtually all of the interviews were conducted "on background," meaning that the identity of the source will be kept confidential. This assurance of confidentiality to our sources was necessary to secure their cooperation.

The sources who helped us were persons of remarkable intelligence. They had unusually precise recall about the handling of cases that came before the Court, particularly the important ones. However, the core documentation for this book came from unpublished material that was made available to us by dozens of sources who had access to the documents. We obtained internal memoranda between Justices, letters, notes taken at conference, case assignment sheets, diaries, unpublished drafts of opinions and, in several instances, drafts that were never circulated even to the other Justices.

*Id.* What was intended by two journalists as a description of thorough and successful investigation is also an indictment of the elite among American law graduates for their shocking disloyalty to their Justices. *But see* Abramson, *Should a Clerk Ever Reveal Confidential Information?* 63 JUDICATURE 361, 402 (1980), for the view that information furnished by law clerks to Woodward and Armstrong regarding non-pending cases may serve the public interest by revealing deliberative impurities resulting largely from the dramatic politicization of the highest state and federal courts. The political and historical value in disclosure may justify eventual release of non-public information about courts and judges, and ought to persuade judges to consent to such publication. But it ought not, at least during the judge's lifetime, ever justify tales of former confidential employees told on their own initiative.

23. *See In re Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488 (11th Cir. 1986). The court of appeals found that a privilege for the benefit of the judge generally obtained with respect to communications between a judge and his clerks, limited only by competing "concerns of great moment." *Id.* at 1524. Judicial recognition of such a common law privilege evidences the importance which courts attach to their institutional privacy, and underscores the gravity of its violation by young lawyers in whom special trust and confidence has been placed by their employer judges.

24. Anonymous judge quoted in *Confidential Duty*, *supra* note 16, at 1237.

POTENTIAL CONFLICTS ARISING FROM FUTURE EMPLOYMENT  
AND FAMILY

The brief terms of most clerkships make possible conflicts of interest and the appearance of impropriety. A clerk who begins a term in chambers already assured of association afterwards with a particular firm would face a conflict of interest were she to involve herself with a case in which her future employers appear. In *Oliva v. Heller*,<sup>25</sup> a law clerk was sued for more than five million dollars in damages for working on a prisoner's petition for post-conviction relief after having accepted an offer from the U.S. Attorney's office.<sup>26</sup> In *Miller Industries, Inc. v. Caterpillar Tractor Co.*,<sup>27</sup> the court found that a law clerk's continued participation in a case in which the clerk's future employers were counsel required disqualification of his judge.<sup>28</sup> In *Hall v. Small Business Administration*,<sup>29</sup> the court found, relying on 28 U.S.C. § 455, that a magistrate should have recused himself when he learned on the first day of trial that his only law clerk was a member of the plaintiff class in the sexual discrimination suit, that she had left defendant's employ complaining of sexual discrimination, and that she had accepted a job offer from plaintiffs' counsel.<sup>30</sup>

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25. 670 F. Supp. 523, 525 (S.D.N.Y. 1987), *aff'd*, 839 F.2d 37 (2d Cir. 1988).

26. The court found her entitled to derivative judicial immunity for actions within the scope of her employment with the court. *Id.* at 526.

27. 516 F. Supp. 84 (S.D. Ala. 1980).

28. *Id.* at 86, 89 (citing 28 U.S.C. § 455(a) which requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned").

29. 695 F.2d 175 (5th Cir. 1983).

30. *Id.* at 177-79. Other cases are collected in Annotation, *Conduct or Bias of Law Clerk or Other Judicial Support Personnel as Warranting Recusal of Federal Judge or Magistrate*, 65 A.L.R. FED. 775 (1983). The Judicial Conference's Advisory Committee on Codes of Conduct thinks that disqualification of the judge is not necessary so long as the clerk is excluded from the case in which the future employer is involved. Advisory Op. No. 74 (Oct. 26, 1984). The Advisory Committee takes the same position when the clerk's future employer is the United States' Attorney. Advisory Op. No. 81 (Sept. 14, 1987). Compare the Conference's disparate treatment of the appearance of impropriety arising from employment of a clerk's spouse in a case. In a 1977 Advisory Opinion, the Committee on Judicial Activities relied upon "the spirit of Canon 3 C(1)(c)" in concluding that a judicial clerk should not work on a case in which the firm employing his or her spouse appears. The Committee's view did not depend on the spouse's personal involvement in the case, nor, conversely, on the impenetrability of any "Chinese wall" within the firm. Distinguishing a prior ABA Formal Opinion which allowed an adequately informed client to decide whether to continue representation when his lawyer's spouse worked in an opposing firm, the Committee noted the absence of any client to whom the law clerk or judge could refer the decision. The Committee was unpersuaded that referral to the attorneys would suffice in the alternative. Advisory Op. No. 51, Advisory Committee on Judicial Activities (Aug. 15, 1977).

The Committee also thought that a different question would be presented were the spouse an Assistant United States Attorney, public defender, or other government attorney, because of the absence of a financial interest on the spouse's part. *Id.* (citing Advisory Opinion No. 38). This view fails to consider the importance of a spouse's interest in tenure and advancement as a government lawyer. If public employment ambitions can be just as important to a clerk's spouse as private



Many judges make it known to applicants for their clerkships that they prefer young lawyers who will join local firms after their stint with the judge. Such a preference increases the likelihood of conflicts involving law clerks, and such clerks ought to be retained by judges only after consideration of the concomitant risk to efficient chambers administration. In any case, the decision about what to do about an apparent conflict of interest, like most other decisions in his court, belongs to the judge, not the clerk. "Judges recuse themselves, not law clerks."<sup>31</sup> Law clerks ought to heed the advice of Rule 1.12 of the *Model Rules*<sup>32</sup> and keep their judges well informed about employment interviews and offers.<sup>33</sup>

Judge Alvin B. Rubin, who authored the opinion in *Hall v. Small Business Administration*, opined in a handbook for federal law clerks: "When a clerk has accepted a position with an attorney or with a firm, that clerk should cease further involvement in those cases in which the future employer has an interest."<sup>34</sup> Judge Rubin's strict view of law clerk purity no doubt stems from his experience in an appellate court, where several judges are each served by three law clerks. Withdrawal by one clerk will be relatively painless for the appellate judge who can easily recruit a stand-in from his own or from another judge's chambers. However, many other courts lack such resources. Like federal magistrates, many state judges enjoy the services of but one clerk; indeed, some judges must share a single clerk. Substitutes can be hard to come by in rural courts.

The limitations of a small pool of available law clerks might seem well illustrated by the web of conflicts potentially handicapping Judge Raymond Acosta's use of his law clerks in mass tort litigation in Puerto Rico. Fifty-one Puerto Rican law firms appeared for 2,300 defendants at a time when less than 500 lawyers comprised the entire federal bar of the island. One clerk's brother was a partner in a San Juan law firm representing 58 plaintiffs; the other clerk's brother was a member of the firm representing the defendant corporation. In *In re Allied-Signal, Inc.*,<sup>35</sup> the Court of Appeals

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employment ambitions, then the safeguards concerning judicial clerks married to public lawyers ought to be as stringent as those for the clerk spouses of private lawyers.

31. Interview of Judge David Schwartz, United States Court of Claims (1981).

32. MODEL RULES Rule 1.12(b) states in part,

A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator.

33. CODE OF CONDUCT FOR LAW CLERKS Canon 3(D). See generally Comment, *Protecting the Appearance of Judicial Impartiality in the Face of Law Clerk Employment Negotiations*, 62 WASH. L. REV. 813 (1987).

34. A. RUBIN & L. BARTELL, LAW CLERK HANDBOOK 23 (Rev. 1989).

35. See *In re Allied Signal, Inc.*, 891 F.2d 967, 972-73 (1st Cir. 1989), cert. denied, 110 S. Ct. 2561 (1990).

declined to order a mistrial or disqualify Judge Acosta despite the potential appearance of impropriety presented by his clerks' family connections. Writing for the court, Judge Breyer took some pains to distinguish this case from others in which a law clerk's family connections create at least the appearance of impropriety. Recognizing that "the appearance of impropriety" has a relativist component, the Appeals Court noted that

The risk that a law clerk, or some other staff member, will have a brother or sister or some other family member involved in this case is a likely concomitant of trying such a large case in a small district. . . . [A] knowledgeable objective observer is therefore more likely to see the relation as implicit in the special circumstances than as an odd coincidence the failure to avoid which might suggest bias.<sup>36</sup>

In addition to the external context in which propriety is tested, Judge Breyer noted that Judge Acosta had shown an appreciation for circumstances which demanded withdrawal by granting a recusal motion in an earlier case in which both a former law clerk and a brother of the only available current law clerk appeared as counsel.<sup>37</sup> In a complex case such as *Allied Signal*, however, the benefit of the normally appropriate procedure of denying the clerk's participation in the case was outweighed by the potential contributions of two career law clerks who had been with Judge Acosta since the case began.<sup>38</sup>

Judge Breyer appears not to have considered the relative ease with which substitutes untarnished by family connections could have been recruited for temporary assignment to Judge Acosta. Judge Breyer mistakenly measured the pool of available law clerks by the number on the island of Puerto Rico. Fixing the sum of available clerk resources at the number locally available arbitrarily overstated the burden on Judge Acosta of preventing even the appearance of impropriety. But judicial clerks ought to be at least as interchangeable as federal judges, when substitution is prompted by the appearance of impropriety.<sup>39</sup> The pool of available substitutes should therefore be

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36. *Id.* at 971-72.

37. *Id.* at 971 (citing Opinion and Order of Sept. 10, 1986, *Pan American Grain, Inc. v. M/V Freedom*, Civil No. 84-1795 (D.P.R.)).

38. *Id.* at 972-73.

39. The chief judge of each of the federal circuits is authorized to temporarily assign a district judge to another district within the circuit, or to the circuit's court of appeals, whenever the business of the court so requires. *Accord* 28 U.S.C. § 292 (1988). The Chief Justice of the United States may temporarily assign a district judge to another circuit, when the need arises. *Id.* See generally 1 C. MILLER, *CYCLOPEDIA OF FEDERAL PROCEDURE* §§ 1.17 & 1.21-1.30 (3d ed., 1989 rev. vol.). A recent example of the latter procedure is reported in *United States v. Claiborne*, 870 F.2d 1463 (9th Cir. 1989). During the period Aug. 1, 1988 through Jan. 31, 1989, 58 intercircuit assignments were undertaken by 47 judges. Report of the Proceedings of the Judicial Conference of the United States, *supra* note 15, at 18.

An intercircuit assignment particularly instructive in this context occurred in 1981, when a judge

measured nationwide. Certainly volunteers among judicial clerks and staff attorneys unrelated to members of the law firms involved in the suit could have been found elsewhere in the First Circuit (if not elsewhere in the federal court system) willing to take an assignment to Judge Acosta's chambers in San Juan — particularly if they were approached in the wintertime. In declining to order Judge Acosta to remove his clerks from the case, Judge Breyer assigned too little weight to the importance of consistency in dealing with questions of judicial impropriety and too much weight, as did Judge Acosta, to the court's convenience. Whether real or imagined, the influence said by some to be exercised by law clerks over their judges<sup>40</sup> makes the appearance of impropriety by a law clerk as serious as the appearance of impropriety by his judge. Rules and remedies for the former are reasonably drawn from among those for the latter.<sup>41</sup>

As Judge Acosta's case illustrates, family relationships, like employment, can produce apparent conflicts of interest for the law clerk. In *Parker v. Connors Steel Co.*,<sup>42</sup> the court found an appearance of partiality where the law clerk's father was a partner in the firm representing a party. While the appellate court did not require the trial judge's recusal in either *Parker* or *Allied Signal*, the judges' handling of the issue came under close scrutiny on appeal. To avoid the necessity for such scrutiny, the law clerk owes the judge prompt notice of either family or career connections with a case in the judge's court.

Federal law prohibits the appointment of a federal judge's family member to "any office or duty in any [federal] court."<sup>43</sup> The Comptroller General has stated that the position of law clerk is not an office or duty within the

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of the Eastern District of Virginia was ordered by Chief Justice Burger to San Juan. Designation of District Judge for Service in Another Circuit (the Hon. Robert R. Merhige, Jr. to the District of Puerto Rico) (June 13, 1981); Inter-Circuit Assignment of a United States Judge, Certificate of Need, United States District Court for the District of Puerto Rico (1st Cir., March 24, 1981). In San Juan, Judge Merhige considered a motion for disbarment brought by the governor of Puerto Rico, Carlos Romero Barcelo, against his apparent successor and political nemesis, Rafael Hernandez Colon. The motion was based upon Hernandez Colon's televised claim that Romero Barcelo had hired an assassin to kill Hernandez Colon and burn down the building where gubernatorial ballots were being counted. *In re Hernandez Colon*, No. 80 Misc. 0052, December 28, 1982. This *cause célèbre* pitted the leaders of Puerto Rico's two major political parties against each other in federal court. Neither Chief Judge Coffin nor Chief Justice Burger appears to have regarded the island's small coterie of federal judges as the total pool from which a judge had to be drawn.

40. See, e.g., Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74; Rogers, *Do Law Clerks Wield Power in Supreme Court Cases?*, U.S. NEWS & WORLD REP., Feb. 21, 1958, at 114; see also Crump, *Law Clerks: Their Roles and Relationships with Their Judges*, 69 JUDICATURE 236 (1986); Mahoney, *Law Clerks: For Better or Worse?*, 54 BROOKLYN L. REV. 321, 326-27 (1988).

41. A judge would not inappropriately express himself on the subject by paraphrasing Caesar: "I wished my clerk to be not so much as suspected." Cf. PLUTARCH, LIVES, CAESAR, § 10.

42. 855 F.2d 1510 (11th Cir. 1988), cert. denied, 490 U.S. 1066 (1989).

43. 28 U.S.C. § 458 states: "No person shall be appointed to or employed in any office or duty in

meaning of this prohibition,<sup>44</sup> so the anti-nepotism statute apparently does not prevent a judge from appointing as a law clerk his own or a colleague's relative.<sup>45</sup> The Judicial Conference's Advisory Committee on Codes of Conduct has announced, however, that the *Code of Judicial Conduct* sets a standard stricter than that of the nepotism statute, and prohibits a judge from hiring as her clerk the son or daughter of a judge sitting on the same court.<sup>46</sup> The Committee relied upon Canons 2 and 3(B)(4) as the basis for its opinion.<sup>47</sup> A similar limitation ought to bind every judge.

### JUDGES AND THEIR CLERKS ARE CONSTRAINED BY THE RECORD

As the judge's research assistant, the law clerk is free to investigate as thoroughly as time permits the legal issues presented in a case before the court. The same is not true for issues of fact. A law clerk must curb her curiosity about matters of fact when it cannot be satisfied by what has been placed in the record. She is not free to do her own investigation to supplement facts provided by the parties, except as to facts of which the court is free to take judicial notice. Such facts generally include only those within everyday common knowledge and those readily ascertainable from indisputable sources.<sup>48</sup> Otherwise, the law clerk must confine herself to the record, or else she and her judge can be accused of prejudice against a party.

In *Price Brothers v. Philadelphia Gear Corp.*<sup>49</sup> a pipe manufacturer claimed that gears supplied by the defendant in a pipe-making machine were defective, amounting to a breach of warranty. At some point before trial, the judge's law clerk travelled, without notifying either party, to inspect the

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any court who is related by affinity or con-sanguinity within the degree of first cousin to any justice or judge of such court." 28 U.S.C. § 458 (1988).

44. See *supra* note 2. The opinion leaves very much open the applicability of the statute to staff attorney appointment.

45. It is at least arguable, however, that the Comptroller General was simply wrong. The distinction he makes might make some sense in situations where law clerk salaries were paid out of pocket by the judges for whom they worked. However, as already noted, by 1886, Congress had authorized payment for one clerical assistant for Supreme Court Justices and increased that to two in 1919. Federal circuit judges gained their first congressionally authorized clerks in 1930, and in the year of the Comptroller General's opinion, certain district judges were allowed the same assistance. J. OAKLEY & R. THOMPSON, *supra* note 1, at 18.

46. Advisory Comm. on Codes of Conduct, Advisory Op. No. 64 (Aug. 25, 1980). In this context, the Committee regarded each district and circuit court as separate. A majority of the Committee thought a judge could hire the relative of another judge on a different court in the same circuit, so long as that clerk was excluded from any participation in cases from the other court.

47. *Id.*

48. See FED. R. EVID. 201. See generally MCCORMICK ON EVIDENCE, §§ 328-35 (3d ed. 1984); 9 J. WIGMORE, EVIDENCE § 2569 (Chadbourn rev. 1981); Davis, "There is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts, 100 HARV. L. REV. 1539 (1987); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944).

49. 649 F.2d 416 (6th Cir.), *cert. denied*, 454 U.S. 1099 (1981).

machine as it was installed in the plaintiff's factory. On appeal, the court found that such an adventure raised serious questions about the impartiality of fact-finding by the trial judge and created a presumption of prejudice to the defendant at trial.<sup>50</sup> In *Kennedy v. Great Atlantic & Pacific Tea Co.*,<sup>51</sup> a law clerk (with the unfortunate name of James Madison) on a rainy evening took his date to inspect the grocery store site of a slip and fall. When defendant's counsel found out, he called the law clerk to testify at trial. On appeal, the court found sufficient prejudice from the clerk's violation of canon 3(A)(4) of the *Code of Judicial Conduct* and of the *Federal Rules of Evidence* Rule 605<sup>52</sup> to warrant reversal and remand.<sup>53</sup> "It was his duty," wrote the court, "as much as that of the trial judge to avoid any contacts outside the record that might affect the outcome of the litigation."<sup>54</sup> What may have seemed to be an extra effort by a diligent subordinate at the time can prove a life-long professional embarrassment for the law clerk who investigates outside the record.

The obligation to remain within the scope of the record goes beyond refraining from inspections of the scene. It extends to *ex parte* communication to the judge of facts relevant to disposition of the case.<sup>55</sup> The law clerk's role as a judge's research assistant does not necessarily make every communication between clerk and judge proper. On the contrary, when a clerk offers a judge deciding a case information about anything but law, the clerk usurps the role of counsel. Such communications are improper, only in part because they are typically *ex parte*.

As a judge's research assistant, a clerk is expected to discover relevant law in published cases and promulgated statutes or regulations. To discover the law itself, a clerk is often expected to add the gloss of its published interpretations by legal scholars. That the law clerk frequently delivers to the judge his findings about law only after the record is closed, and without particular notice to the attorneys, seems nevertheless fair for the parties because of a convention regarding accessibility: The law and its interpretation is presumed to be out there for every lawyer to find.<sup>56</sup> Clearly, albeit curiously, this convention reaches not only law found in the public record, but also its

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50. *Id.* at 419-20.

51. 551 F.2d 593, 594 (5th Cir. 1977).

52. "[T]he judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." FED. R. EVID. 605.

53. 551 F.2d at 596-97. Acknowledging that Rule 605, by its terms, applied only to the judge, the court of appeals nevertheless found that presenting the presiding judge's law clerk to the jury as a witness posed the same threat to the jury's independence of judgment as would presenting the judge himself. *Id.* at 598.

54. *Id.* at 596.

55. "A judge should . . . neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." CODE OF JUDICIAL CONDUCT Canon 3(A)(4) (1972).

56. See 9 J. WIGMORE, *supra* note 48, § 2569. "Since [legal facts] are to be decided by the judge,

interpretation, which is often found in privately published journals and treatises. In light of this convention, the clerk and his judge do not prejudice a party when the clerk delivers *ex parte* the results of legal research, even when such research includes cases or law review articles unmentioned by counsel in briefs or comments on the record. Indeed, a clerk's discovery of binding precedent not previously offered by counsel ought to be a moment of triumph for the clerk and satisfaction for his judge.

The same is not, and should not be, true for the clerk's report of facts other than law and its associated commentary. Here applies the court's obligation to consider and decide within the constraints of a record dictated by counsel. Just as a law clerk's visit to the scene breaches the record of the case, so should a law clerk's gleaning of facts by research in other than legal libraries or databases. Where, for example, the record leaves the judge unclear about how a machine, a bank, a drug, or a culture operates, the clerk ought not to repair to the local library for a text on the subject. Neither the social nor the physical sciences ought to be presumed to be as accessible to the legally trained as the law and its interpretation.<sup>57</sup> Thus, the convention regarding communications about law should not reach facts,<sup>58</sup> and a clerk generally ought not to engage in research to enlarge upon the non-legal facts of the record.

Judicial notice, an alternative convention, permits a judge to introduce into the record certain facts, but only after alerting counsel and affording them opportunity to challenge or qualify the source from which these facts are to be drawn.<sup>59</sup> Thus, if a judge and her clerk conclude that research to

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he is at liberty to investigate the facts for himself in addition to receiving the evidence which the parties may offer." *Id.* at 725 (emphasis in original).

57. My colleague, Professor Andre Moenssens, has reminded me that law review articles are sometimes improperly relied upon for non-legal facts as well as, or instead of, legal interpretations. He tells of a series of law review notes and comments which all reported criticism of DNA testing (for identification of bodily secretions) made by scientists who had assumed an adversarial position regarding DNA identification reliability. The criticism appeared in an article by experts employed by the defense in a well-publicized trial. Their views were never subjected to expert peer review or presented to juried scientific journals; nevertheless, these opinions achieved more and more prestige in the legal literature as they were picked up and repeated by student authors who failed to adequately survey the relevant scientific literature. See Moenssens, *DNA Evidence and its Critics—How Valid Are the Challenges?*, 31 JURIMETRICS J. at nn. 12, 29, & 40 (1990).

58. Justice Marshall wrote in *United States v. Wilson*, 32 U.S. 150, 150 (1833):

[T]he judge sees only with judicial eyes, and knows nothing respecting any particular case of which he is not informed judicially; . . . The looseness which would be introduced into judicial proceedings [otherwise] would prove fatal to the great principles of justice.

59. FED. R. EVID. 201(e). A complementary rule regarding legal facts exists in some jurisdictions. See, e.g., ALASKA R. EVID. 202; FLA. STAT. ANN. § 90.202 (West 1979); MONT. R. EVID. 202; TEX. R. EVID. 202. No such rule exists in federal courts. These rules pertaining to legal facts are permissive, that is, they make explicit the judge's power to take notice of legal facts other than those offered by counsel; they do not incorporate the common notice and comment limitations (like those in FED. R. EVID. 201(c) and (e) on taking notice of facts).

produce additional facts is essential, the record should be reopened in order to record notice to counsel and their response to either the importance of the research or the validity of its results.

If supplementation of the facts in the record by a law clerk's research is normally to be discouraged and is only to be permitted in most instances after notice and comment by counsel, then it should follow with equal vigor that a clerk cannot offer his judge his expertise in matters other than law. Judges Leventhal and Wyzanski are both known to have engaged particular law clerks because of their non-legal expertise.<sup>60</sup> Judge Wyzanski appointed a Harvard economist as his law clerk to assist with a difficult antitrust case.<sup>61</sup> Judge Leventhal employed a scientifically trained clerk to help with difficult environmental cases. While Judge Wyzanski later admitted he would not make another such appointment, in part because of his concerns about the undue influence on the judge of an expert in chambers,<sup>62</sup> Judge Leventhal called for special clerkships reserved for the scientifically trained.<sup>63</sup> When a law clerk, also trained as an economist or a biologist, is available within chambers to offer economic or biologic information to a judge deciding factual issues of economics or biology, the parties' right to a decision on the record is violated. Affording notice and an opportunity for comment on the clerk's findings cannot alleviate the harm without leading inexorably to the law clerk's transmutation from chambers staff to witness.

Success in a field other than law ought not, however, create an obstacle to

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60. Wald, *Making "Informed" Decisions on the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135, 152 (1982).

61. *Id.* at 152 n.80.

62. Wyzanski, *The Law of Change*, 38 N.M.Q. 5, 18-20 (1962). Judge Wyzanski's law clerk, Professor Carl Kaysen, agreed with his judge that the chambers expert created more problems than he solved:

[I]t may be argued that everything that goes towards influencing the Court's decision, outside what is in the mind of the judge himself should be spread on the record. . . . Even if it is assumed that every judge is as well able to interpret what an economic expert tells him in private, use what is useful, and reject what is not, as Judge Wyzanski clearly was, and that therefore the parties are in no way prejudiced by this procedure, it may be argued that the adversary process is changed in an undesirable way. Ideally, the judge functions as an expert only in law; in other areas he is a layman, one unusually gifted in the art of receiving instruction from those temporary experts, counsel for the contending parties, on the substantive, non-legal facts before him. So instructed, he decides between the contending views presented to him. To inject into this process an expert in a particular class of facts and to allow him private access to the judge, protected from the scrutiny of examination by the parties, undermines to some extent the adversary character of the proceedings. The more weight the expert has in the outcome, the more it can be argued that an *ex parte* process is being substituted for the traditional adversary proceedings. . . .

Webster, *The Use of Economics Experts as Witnesses in Antitrust Litigation*, 17 THE RECORD 456, 460 (1962) (quoting from a speech by Carl Kaysen).

63. Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 550-552 (1974).

subsequent appointment as a law clerk by a judge overzealous to prevent the appearance of impropriety by the suggestion of *ex parte* fact finding or improper influence. Any limitation on the communications between a judge and her chambers staff must, in the end, be largely self-enforced. A judge who announces a preference for one or more non-legal backgrounds ought to make clear to her law clerks from the outset how the record must limit the clerk even in the field of his expertise. Just as a careful clerk working for a careful judge will always relate each proposed conclusion of law to a case or statute, a careful clerk working for a careful judge will always relate each finding of fact to the specific part of the record in which supporting evidence can be found. Such a practice is the best safeguard against extra-record fact finding.

### CONCLUSIONS

Judicial clerks who have been admitted to the bar are obliged to conform their professional conduct to ethical standards adopted by the bar, unless a higher standard applies because of their special status as court insiders. Whether admitted to the bar or not, all judicial clerks must conform to certain standards set by their judges. Some of these judge-made standards, particularly those derived from standards originally imposed on the judges themselves, have appeared in case law. Others are transmitted informally by judges as part of each clerk's orientation. The standards which bind judicial clerks should also bind staff attorneys and students working as interns.

The most important of these behavioral norms follow from the respect owed litigants by all court personnel and the loyalty owed judges by all staff members. From respect for litigants comes the duty to act impartially and with meticulous regard for the record; from loyalty to the judge comes the duty to preserve even the appearance of impartiality and the duty to keep silent about chambers matters.

A judge's law clerk should watch for potential conflicts of interest arising from relationships of family or future employment. A clerk should immediately bring any potential conflicts to the attention of her judge. It is for the judge, and not the clerk, to decide when the potential is serious. A judge's law clerk should not gossip. His reticence should reach not only matters under the court's active consideration, but also anything which the clerk has learned through the special access the job affords. This duty survives the end of the clerkship. A judge's law clerk should not investigate, nor introduce to the deliberation of the court, facts about any subject but the law. Upon each law clerk's faithfulness to these standards rest that clerk's reputation, every judge's confidence, and the future of the office.



**APPENDIX**  
**CODE OF CONDUCT FOR LAW CLERKS**

**CANON 1**

**A LAW CLERK SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF  
THE JUDICIARY AND THE OFFICE**

An independent and honorable judiciary is indispensable to justice in our society. A law clerk should observe high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective. The standards of this Code shall not affect or preclude other more stringent standards required by law, by court order, or by direction of the appointing judge.

**CANON 2**

**A LAW CLERK SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF  
IMPROPRIETY IN ALL ACTIVITIES**

A law clerk should not engage in any activities that would put into question the propriety of the law clerk's conduct in carrying out the duties of the office. A law clerk should not allow family, social, or other relationships to influence official conduct or judgment. A law clerk should not lend the prestige of the office to advance the private interests of others; nor should the law clerk convey or permit others to convey the impression that they are in a special position to influence the law clerk.

**CANON 3**

**A LAW CLERK SHOULD PERFORM THE DUTIES OF THE OFFICE  
IMPARTIALLY AND DILIGENTLY**

The official duties of a law clerk take precedence over all other activities. Official duties include all the duties of the office prescribed by law, resolution of the Judicial Conference of the United States, the court in which the law clerk serves, and the appointing judge. In the performance of these duties, the following standards apply:

- A. A law clerk should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary and of the office.
- B. A law clerk should maintain professional competence in the profession. A law clerk should be dignified, courteous, and fair to all persons with whom the law clerk deals in the law clerk's official capacity.

A law clerk should diligently discharge the responsibilities of the office. A law clerk should bear in mind the obligation to treat fairly and courteously the general public as well as the legal profession.

- C. The relationship between judge and law clerk is essentially a confidential one. A law clerk should abstain from public comment about a pending or impending proceeding in the court in which the law clerk serves. A law clerk should never disclose to any person any confidential information received in the course of the law clerk's duties, nor should the law clerk employ such information for personal gain. This subsection does not prohibit a law clerk from making public statements in the course of official duties to the extent authorized by the appointing judge.
- D. A law clerk should inform the appointing judge of any circumstance or activity of the law clerk that might serve as a basis for disqualification of the judge, e.g., a prospective employment relation with a law firm, association of the law clerk's spouse with a law firm or litigant, etc.

#### CANON 4

##### A LAW CLERK MAY ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE

A law clerk, subject to the proper performance of official duties, may engage in the following law-related activities:

- A. A law clerk may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.
- B. A law clerk may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice.
- C. A law clerk may promote the development of professional organizations and foster the interchange of technical information and experience with others in the profession. A law clerk may make himself or herself available to the public at large for speaking engagements and public appearances designed to enhance the public's knowledge of the operation of the court system.

#### CANON 5

##### A LAW CLERK SHOULD REGULATE EXTRA-OFFICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH OFFICIAL DUTIES

- A. *Avocational Activities.* A law clerk may write, lecture, teach, and speak on nonlegal subjects and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not

detract from the dignity of the office or interfere with the performance of official duties.

- B. *Civic and Charitable Activities.* A law clerk may participate in civic and charitable activities that do not detract from the dignity of the office or interfere with the performance of official duties. A law clerk may serve as an officer, director, trustee or nonlegal advisor of an educational, religious, charitable, fraternal, or civic organization and solicit funds for any such organization subject to the following limitations:

- (1) A law clerk should not use or permit the use of the prestige of the office in the solicitation of funds.
- (2) A law clerk should not solicit court personnel to contribute to or participate in any civic or charitable activity, but may call their attention to a general fund-raising campaign such as the Combined Federal Campaign and the United Way.
- (3) A law clerk should not solicit funds from lawyers or persons likely to come before the court in which the law clerk serves.

C. *Financial Activities.*

- (1) A law clerk should refrain from financial and business dealings that tend to detract from the dignity of the office, interfere with the proper performance of official duties, exploit the law clerk's position, or involve the law clerk in frequent transactions with individuals likely to come in contact with the law clerk or the court in which the law clerk serves. During the clerkship, a law clerk may seek and obtain employment to commence after the completion of the clerkship; if any law firm, lawyer, or entity with whom a law clerk has been employed or is seeking or has obtained future employment appears in any matter pending before the appointing judge, the law clerk should promptly bring this fact to the attention of the appointing judge, and the extent of the law clerk's performance of duties in connection with such matter should be determined by the appointing judge.
- (2) Neither a law clerk nor a member of the law clerk's household should solicit or accept a gift, bequest, favor or loan from anyone except for—
  - (a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the law clerk and a family member to attend a bar-related function or an activity devoted to the improvement of the law, the legal system, or the administration of justice;
  - (b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a law clerk residing in the law clerk's household, including gifts, awards and benefits for the use of both the spouse or other family member and the law clerk (as spouse or family member),

provided the gift, award or benefit could not reasonably be perceived as intended to influence the law clerk in the performance of official duties;

- (c) ordinary social hospitality;
  - (d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;
  - (e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require that the law clerk take no official action with respect to the case;
  - (f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not law clerks;
  - (g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or
  - (h) any other gift, bequest, favor or loan, only if:
    - (i) the donor has not sought and is not seeking to do business with the court or other entity served by the law clerk; or
    - (ii) the donor is not a party or other person who has had or is likely to have any interest in the performance of the law clerk's official duties.
- (3) A law clerk should report the value of any gift, bequest, favor, or loan as required by statute or by the Judicial Conference of the United States.
- D. *Practice of Law.* A law clerk shall not practice law in any federal, state, or local court, or undertake to perform legal services for any private client in return for remuneration. This prohibition, however, shall not be construed to preclude the performance of routine legal work necessary to the management of the personal affairs of the law clerk or a member of the law clerk's family, so long as:
- (1) Such work is done without compensation or for nominal compensation;
  - (2) It does not require any act, including the entry of an appearance in a court of the United States, that would suggest that the position of Law Clerk is being misused, that preferential treatment is being sought by virtue of the holding of that position, or that would otherwise be inconsistent with the law clerk's primary responsibility to the court; and
  - (3) So long as such activity does not have actual conflict or appear in conflict with court duties or will not reflect adversely on the court or create the appearance of impropriety.

A law clerk should ascertain and observe any limitations imposed by the appointing judge or the court on which the appointing judge serves concerning the practice of law by a former law clerk before the judge or the court.

### CANON 6

#### A LAW CLERK SHOULD REGULARLY FILE ANY REQUIRED REPORTS OF COMPENSATION RECEIVED FOR ALL EXTRA-OFFICIAL ACTIVITIES

A law clerk may receive compensation and reimbursement of expenses for all extra-official activities permitted by this Code, if the source of such payments does not influence or give the appearance of influencing the law clerk in the performance of official duties or otherwise give the appearance of impropriety, subject to the following restrictions:

- A. *Compensation.* Compensation should not exceed a reasonable amount nor should it exceed that normally received by others for the same activity.
- B. *Expense Reimbursement.* Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by a law clerk and, where appropriate to the occasion, by the law clerk's spouse. Any payment in excess of such an amount is compensation.
- C. *Public Reports.* A law clerk should make and file such reports as may be prescribed by law or by the Judicial Conference of the United States.

Notwithstanding the above, a law clerk shall not receive any salary, or any supplementation of salary, as compensation for official services from any source other than the Government of the United States.

### CANON 7

#### A LAW CLERK SHOULD REFRAIN FROM POLITICAL ACTIVITY

- A. *Political Activity.* A law clerk should refrain from political activity; a law clerk should not act as a leader or hold office in a political organization; a law clerk should not make speeches for or publicly endorse a political organization or candidate; a law clerk should not solicit funds for or contribute to a political organization, candidate for political or public office; a law clerk should not otherwise engage in political activities.

### EFFECTIVE DATE OF COMPLIANCE

Persons to whom this Code becomes applicable should arrange their affairs as soon as reasonably possible to comply with it and should do so in any event within thirty days of the appointment.